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In The Supreme Court
of the
United States

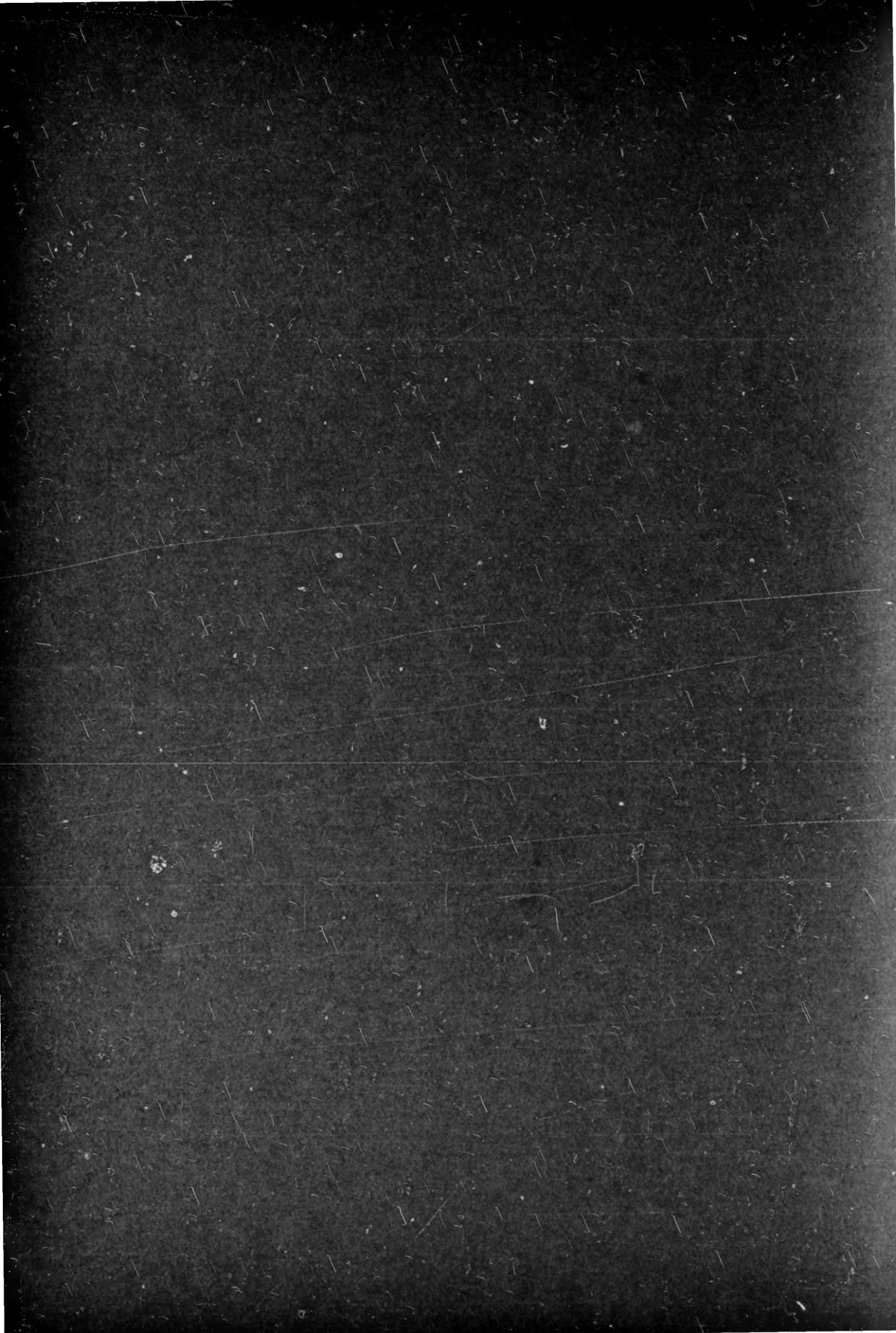
OCTOBER TERM, 1990

No. 90-613

BLACK CRYSTAL COMPANY, INC.,
Petitioner
V.
FIRST NATIONAL BANK OF LOUISVILLE
Respondent

In Reply to Brief in Opposition to
PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

JAMES K. O'GALLAGHER, ESQ.
55 NEW MONTGOMERY STREET, # 306
SAN FRANCISCO, California 94105
(415) 243-0573
ATTORNEY FOR PETITIONER



QUESTIONS PRESENTED

1. Given the conflicts of testimony and interpretation of factual developments in this case, did the courts properly construe the evidence and inferences therefrom in the light most favorable to Petitioner in accordance with standards for summary judgement? (Fed.R.Civ.P. 56)

2. Did the courts take proper notice of the provisions of the Uniform Customs and Practice for Documentary Credits (UCP), as sanctioned by the Uniform Commercial Code, Article 5-102(4), in interpreting the facts bearing on First National Bank's actions in regards to this letter of credit?

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PETITIONER'S REPLY to Brief in Opposition to PETITION for WRIT of CERTIORARI

Petitioner prays this Court to grant Writ of Certiorari on the grounds that the Sixth Circuit Court of Appeals

(Sixth Circuit) sanctioned such a departure from the accepted and usual course of judicial proceedings by the Federal District Court as to call for this Court's power of supervision [Supreme Court Rule 10.1(a)].

STATEMENT OF THE CASE

This is a case for wrongful dishonor of an irrevocable, negotiable Letter of Credit.

Petitioner takes exception to Respondent's statement that it "embarked on a course of missed deadlines" on appeal. Only a few cases concerning a bank's malfeasance against the Beneficiary of a letter of credit have been considered in Federal Courts; it is most difficult for a small business to obtain knowledgeable counsel, most of whom are on retainer to banks. In this case, Petitioner's attor-

neys abruptly withdrew claiming inexperience with such arcane matters. Petitioner's efforts to appear Pro Se were accepted first, then rejected by the Sixth Circuit after strenuous arguments by Respondent. New counsel was obtained and the case reinstated.

Respondent's claim that the Petitioner incorrectly framed the issues to involve letters of credit is self-serving; the Writ is sought precisely because the lower courts granted and upheld summary judgement contrary to careful consideration of the specifics of the case, applicable law (UCC-UCP), and standards for imposing summary judgments.

Restating the Sixth Circuit finding that there is no genuine issue of material fact merely points to the Court's lapse in analysis rather than to

its understanding of the matter put before it. The District Court adapted almost verbatim the Respondent's version of the case; the Court of Appeals, against the preponderance of documentary evidence presented by Petitioner, adopted the lower court opinion, "as though it were our own."

In finding the Petitioner's evidence and questions regarding the bank's conduct insufficient to require a jury trial the lower courts mistook the Respondent's torrent of verbiage for the truths they were bound to pursue.

FACTS

Respondent commented on Petitioner's "convoluted statements, commingled legal arguments, and misstatement of facts." Petitioner

responds that it structured its presentation of the chain of events to include appropriate references, with documentation, to:

1. Expert testimony concerning the status and role of United Kentucky Bank the negotiating bank (Parson's affidavit).

2. Assignments of Proceeds/drafts issued early on by United Kentucky Bank as the negotiating bank.

3. Acceptance by United Kentucky Bank of required commercial documents, including Bill of Lading, prior to Letter of Credit expiration date.

4. Telexes concerning Beneficiary's request that United Kentucky Bank confirm the credit, as well as Respondents malicious

"Urgent" telex interfering with above request of Beneficiary, thus destroying relationship between Beneficiary and United Kentucky Bank.

5. Telexes related to Respondent Banks failure to utilize key test procedure to authenticate the credit to carriers bank (Banks routinely use coded messages as security measure for electronic money transfer around the world)

6. Telexes showing Respondents improper interfering communication with the carrier altering the terms of the credit/assignment of proceeds (from irrevocable Letter of Credit to revocable Letter of Credit), thus destroying the charter contract.

Contrary to Respondent's illusions, a case can only be properly argued with specific examples. These portions of the Petitioner's evidence, and much more, have been recited to demonstrate that the weight of the evidence favoring Petitioner is such as to preclude summary judgement.

Throughout these lengthy proceedings in the courts, Respondent has failed to offer any justification for its actions in contravention of its duties and responsibilities.

Significantly, the only "fact" mentioned in Respondent's Brief in Opposition is to the "uncontroverted" testimony of the United Kentucky Bank officer that it was "never" the negotiating bank. By ignoring Petitioner's evidence that United Kentucky Bank prepared a memo to its staff giving instructions as to procedures for negot-

iating this Letter of Credit transaction,issued assignments of proceeds and attempted to make the 2nd tender of documents to the Respondent - the whole of Respondent's argument should become suspect; proof in refute of Respondent's testimony clearly demonstrates its willingness to deceive the Court. The Respondent attempts to convince this court that the Letter of Credit expired before the presentation of the documents and draft. The Uniform Customs and Practices for Documentary Credits, requires the return of invoice and bill of lading to the beneficiary [Schweibish v. Pontchartrain State Bank, La. App.(1980) So. 2d 731 (Writ refused), 396 So. 2d 885]. Banks did not inform Beneficiary of Letter of Credit of its decision to dishonor such letter and did not return invoices and

bill of lading to Beneficiary. Therefore Banks could not dishonor the Letter of Credit on grounds that documentation was not in strict compliance with the terms of credit. The Petitioner and United Kentucky Bank testimony clearly stated that the original Letter of Credit has never been forwarded.

In light of Respondent's reliance at this point on a single deposition, how can it be argued that there is no genuine issue of fact involved? Examination of the deponent and introduction of the relevant material evidence of his activities would surely belie this bank officer's testimony.

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI

Supreme Court Rule 10.1(a) states that this Court may intervene if another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court.

Petitioner contends that the Sixth Circuit Court of Appeals sanctioned the improper granting of summary judgement by the District Court, Louisville KY.

A. The District Court failed to consider Petitioner's arguments concerning Respondent's conduct violative of UCC-UCP regulations governing the handling

of letters of credit (Uniform Commercial Code - Article 5). For example, the impropriety of Respondent's confirmation/Amendment No.9 later had grave consequences as it placed Respondent in a position allow it to alter the conditions of the assignment of proceeds and drafts issued by Petitioner and his negotiating bank (United Kentucky Bank), and accepted by the vessel's agent. This intermeddling led to the carrier's repudiation of its contract for carriage - and the unjustifiable prevention of Petitioner from meeting the shipping date.

The District Court dismissed the relevance of this confirmation/Amendment 9 and its disastrous consequences by stating that "it merely added another, parallel set of obligations

into the milieu." The Sixth Circuit did not comment on this aberrant conclusion!

Respondent violated the law in unilaterally amending (altering!) the terms and conditions of the letter of credit. Its actions were the proximate cause of the late shipping date, later claimed by Respondent as justification to dishonor the letter of credit.

Petitioner has discussed this chain of events extensively in prior submissions to the lower courts, and can only surmise that in reaching their conclusions they failed to observe the evidence and misapplied the law.

B. A motion for summary judgement is intended as a device to pretest issues developed in the pleadings to determine whether they are substantial enough to

warrant trial. It must be established beyond question that the issues raised are not genuine, because the motion is not a substitute for trial. Summary judgement should not be imposed lightly and without the most serious deliberation, as at best, it tends toward subjectivity.

C. The Sixth Circuit Improvidently Affirmed Summary Judgement.

The Court of Appeals reason given in its decision and oral argument was that United Kentucky Bank did not act as the negotiator of the credit - just because the bank officer said that it did not! This reasoning was reached after Petitioner had submitted hard evidence, not conjecture, substantiating its claim that United Kentucky Bank was and did act as its negotiating bank.

Without question this is a triable issue of fact which should properly be brought before a jury. Summary relief cannot be justified where the disputed question of fact turns exclusively on the credibility of Respondent's witness. Certainly, Petitioner is entitled to a trial at which all the circumstances may be developed for the consideration of a jury as trier of fact.

CONCLUSION

The "peculiar gravity and general importance" of this case lies in its implications for the future of U.S. export trade and commerce in general.

Respondent would have this Court believe that this case represents nothing more than a "simple commercial case." It is not simple at all, as it involves the reliability and credibility of letters of credit - the primary method of foreign trade financing. The conduct of the bank in this matter, apparently condoned by the lower courts, suggests that it is difficult to ascertain just what assurances are made to the Beneficiary or holders of assignments of proceeds of

such a credit. The consequences for international trade are vast.

Petitioner asserts that the standards for summary judgement were not met, and that on appeal, the Sixth Circuit failed to consider the inferences from the evidence "in the light most favorable" to Petitioner. The Respondent attempts to convince the court that the Petitioner concurs with the facts as set forth by the District Court and the Sixth Circuit. This is an inaccurate statement. The Petioner does not concur.

In its conclusion , Respondent stated (page 6 paragraph 2) that "..,the Respondent had the obligation to pay only upon presentation of a draft, in conformity with the Credit." This belief is contrary to the recent Ninth

Circuit decision (Northern Trust Co. v Community Bank, 8 UCC Reporting Service 2d 418) which holds that confirming bank is not entitled to independent timely presentment of a draft, unless required by letter of credit provisions.

"Whose truths are believable" and "What evidence is credible" might sum up the questions about the propriety of the decision for summary judgement [Fed.R.Civ.P. 56 (c)]. These are also the very questions which are required to be submitted to a jury.

Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

James K. O'Gallagher

James K. O'Gallagher
Counsel of Record
55 New Montgomery St., # 306
San Francisco, CA 94105
(415) 243-0573
Counsel for Petitioner